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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 UNITED STATES OF AMERICA,
12
13 Plaintiff/Respondent,
14 v.
15 CY IRVING BROWN,
16 Defendant/Movant.

No. 2:03-cr-00104 MCE AC

FINDINGS AND RECOMMENDATIONS

17 Movant, a federal prisoner proceeding with appointed counsel, brings a challenge to his
18 conviction and sentence under 28 U.S.C. § 2255. ECF No. 195. Movant seeks relief pursuant to
19 Johnson v. United States, 135 S. Ct. 2551 (2015). Id. The United States opposes the motion,
20 ECF No. 200, and movant has replied, ECF No. 203.

21 I. BACKGROUND

22 Mr. Brown was convicted by a jury in 2003 of one count of armed bank robbery in
23 violation of 18 U.S.C. § 2113(a) & (d), and one count of using a firearm during a crime of
24 violence in violation of 18 U.S.C. § 924(c). ECF No. 48. He was sentenced on February 24,
25 2004 to 150 months imprisonment on the armed bank robbery count and a consecutive 84 months
26 on the gun count. ECF No. 60. On appeal, the conviction was affirmed but the matter was
27 remanded for resentencing pursuant to United States v. Ameline, 409 F.3d 1073, 1085 (9th Cir.
28 2005) (en banc). ECF No. 84; United States v. Brown, 172 Fed. Appx. 206, 208 (9th Cir. 2006).

1 On remand, the parties stipulated to re-imposition of the original sentence. ECF No. 93.

2 Mr. Brown then filed a motion pursuant to 28 U.S.C. § 2255 in 2007. ECF No. 96. The
3 United States conceded that movant had received ineffective assistance of counsel in relation to
4 the Ameline remand. See ECF No. 127. The district court ultimately conducted a resentencing
5 hearing and concluded that it would have imposed the same sentence had it known that the U.S.
6 Sentencing Guidelines were advisory rather than mandatory. ECF No. 166. Final judgment was
7 entered on August 27, 2014. ECF No. 2014. The Ninth Circuit affirmed. ECF No. 188.

8 The parties agree that the applicable one-year statute of limitations began to run on March
9 1, 2017, and that this motion is therefore timely.

10 II. THE MOTION

11 Movant contends that his conviction under 18 U.S.C. § 924(c) cannot stand, because the
12 statutory language defining “crimes of violence” for purposes of that section is unconstitutionally
13 vague in violation of due process. He contends first that after Johnson, armed bank robbery no
14 longer qualifies as a crime of violence under the statute’s “force clause,” § 924(c)(3)(A). He
15 argues second that the statute’s “residual clause,” § 924(c)(3)(B), is void for vagueness under
16 Johnson.

17 III. PERTINENT STATUTORY FRAMEWORK

18 Title 18 U.S.C. § 924(c), which is the basis for Count Two in this case, provides in
19 pertinent part as follows:

20 Whoever, during and in relation to any crime of violence of drug
21 trafficking crime. . . uses or carries a firearm, shall, in addition to
22 the punishment provided for such crime of violence or drug
23 trafficking crime, be sentenced to imprisonment for five years. . .
In the case of his second or subsequent conviction under this
subsection, such person shall be sentenced to imprisonment for
twenty years. . .

24 18 U.S.C. § 924(c)(1) (1993).

25 The statute defines “crime of violence” as follows:

26 For purposes of this subsection the term “crime of violence” means
27 an offense that is a felony and –

28 (A) Has as an element the use, attempted use, or threatened use of

1 physical force against the person or property of another, or
2 (B) that by its nature, involves a substantial risk that physical force
3 against the person or property of another may be used in the
4 course of committing the offense.

5 Id. § 924(c)(3). Subsection A is known as the “force clause” and subsection B is known as the
6 “residual clause.”

7 The federal bank robbery statute, which is the basis for Count One in this case, provides in
8 pertinent part as follows:

9 (a) Whoever, by force and violence, or by intimidation, takes, or
10 attempts to take, from the person or presence of another, or obtains
11 or attempts to obtain by extortion any property or money or any
12 other thing of value belonging to, or in the care, custody, control,
13 management, or possession of, any bank, credit union, or any
14 savings and loan association; or

15 Whoever enters or attempts to enter any bank, credit union, or any
16 savings and loan association, or any building used in whole or in
17 part as a bank, credit union, or as a savings and loan association,
18 with intent to commit in such bank, credit union, or in such savings
19 and loan association, or building, or part thereof, so used, any
20 felony affecting such bank or such savings and loan association and
21 in violation of any statute of the United States, or any larceny--

22 Shall be fined under this title or imprisoned not more than twenty
23 years, or both.

24 ***

25 (d) Whoever, in committing, or in attempting to commit, any
26 offense defined in subsections (a) and (b) of this section, assaults
27 any person, or puts in jeopardy the life of any person by the use of a
28 dangerous weapon or device, shall be fined under this title or
imprisoned not more than twenty-five years, or both.

18 U.S.C. § 2113(a), (d).

22 IV. ANALYSIS

23 A. Movant’s Challenge to the Residual Clause of § 924(c)(3)

24 In Johnson, the Supreme Court held that the language in the residual clause of the Armed
25 Career Criminal Act of 1984 (“ACCA”), 18 U.S.C. § 924(e), is facially void for vagueness. 135
26 S. Ct. at 2557. The ACCA prescribes 15-to-life sentences for § 922(g) felon-in-possession
27 convictions where there have been 3 or more prior “violent felonies.” The statute defines
28 “violent felonies” as:

1 [A]ny crime punishable by imprisonment for a term exceeding one
2 year, or any act of juvenile delinquency involving the use or
3 carrying of a firearm, knife, or destructive device that would be
punishable by imprisonment for such term if committed by an
adult, that--

4 (i) has as an element the use, attempted use, or threatened use of
5 physical force against the person of another; or

6 (ii) is burglary, arson, or extortion, involves use of explosives, *or*
7 *otherwise involves conduct that presents a serious potential risk of*
physical injury to another.

8 Id. § 924(e)(2)(B) (emphasis added). The italicized portion of the quoted statutory language is
9 known as the residual clause. The Supreme Court found that this language cannot support an
10 enhanced sentence consistent with due process, because it does not give sufficient notice to
11 defendants of the conduct that will support the enhancement, and because it invites arbitrary
12 enforcement by judges. Johnson, 135 S. Ct. at 2557. The holding of Johnson constitutes a new
13 rule of substantive criminal procedure that applies retroactively on collateral review. Welch v.
14 United States, 136 S. Ct. 1257, 1265 (2016).

15 Applying Johnson, the Supreme Court has also invalidated that part of the Immigration
16 and Nationality Act’s definition of “aggravated felony” which borrows the residual clause
17 definition of “crime of violence” from 18 U.S.C. § 16(b). Sessions v. Dimaya, 138 S. Ct. 1204,
18 1211, 1223 (2017) (impermissibly vague to define “crime of violence” requiring deportation as
19 any offense “that, by its nature, involves a substantial risk that physical force against the person
20 or property of another may be used in the course of committing the offense.”).

21 The residual clause language of § 924(c)(3)(B) is substantially identical to that found void
22 for vagueness in Johnson and Dimaya. Accordingly, the undersigned agrees with those district
23 judges who have found § 924(c)(3)(B) to be impermissibly vague under Johnson. See, e.g.,
24 United States v. Lattanaphom, 159 F. Supp. 3d 1157 (E.D. Cal. 2016) (Shubb, J.). This does not
25 help Mr. Brown, however, because his § 924(c) convictions do not rest on the residual clause.

26 Movant’s § 924(c) convictions are predicated on the § 2113 armed bank robbery counts in
27 this case. As explained further below, the Ninth Circuit has held since Johnson that armed bank
28 robbery under federal law is a crime of violence for purposes of § 924(c) under the “force

1 clause.” United States v. Watson, 881 F.3d 782, 783, 784 (9th Cir. 2018) (per curiam).

2 Accordingly, where a § 2113 conviction provides the predicate for application of § 924(c), a
3 Johnson challenge to the residual clause need not be reached. Watson, 881 F.3d at 784 (“We
4 need not address the residual clause because we conclude that the relevant offense of armed bank
5 robbery is a crime of violence under the force clause.”).

6 B. Bank Robbery and the Force Clause of § 924(c)(3)

7 In Watson, the Ninth Circuit squarely held that bank robbery in violation of § 2113(a) and
8 (d) qualifies as a crime of violence under the force clause of § 924(c)(3)(A), and that this result
9 comports fully with Johnson. Watson, 881 F.3d at 784-86. Watson thus forecloses movant’s
10 argument that § 2113 cannot satisfy the force clause. Indeed, the Watson court specifically
11 rejected some of the arguments forwarded by movant here, including the theory that § 2113’s
12 inclusion of “intimidation” as an alternative to “force and violence” as an element of robbery
13 takes it outside the scope of § 924(c)(3)(A). See id. at 785-86. The Ninth Circuit applied the
14 familiar categorical approach to § 2113(a) and (d), and found that they satisfy the Johnson
15 standard. Id. at 786. Accordingly, analysis of movant’s claim begins and ends with Watson.

16 Dimaya, supra, which was decided by the Supreme Court shortly after Watson, does not
17 affect the validity of Watson. While Dimaya provides strong authority for the proposition that §
18 924(c)’s residual clause is unconstitutionally vague, it does not address the question whether the
19 elements of armed bank robbery satisfy the force clause. Because Watson answers that question,
20 and instructs that the constitutional soundness of the residual clause is not at issue where a §
21 924(c) conviction rests on armed bank robbery, Dimaya is inapposite.


22 V. CONCLUSION

23 Based on the foregoing, it is HEREBY RECOMMENDED that the motion to vacate, set aside,
24 or correct movant's sentence pursuant to 28 U.S.C. § 2255 (ECF No. 195) be DENIED.

25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
27 after being served with these findings and recommendations, any party may file written
28 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge's Findings and Recommendations.” Failure to file objections
2 within the specified time may waive the right to appeal the District Court's order. Turner v.
3 Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991). In
4 his objections movant may address whether a certificate of appealability should issue in the event
5 he files an appeal of the judgment in this case. See 28 U.S.C. § 2255(c)(1).

6 DATED: April 9, 2019

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8 ALLISON CLAIRE
9 UNITED STATES MAGISTRATE JUDGE
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